IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2377 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHENDRA RASIKLAL JOSHI

Versus

KIRITKUMAR DWARKADAS PATEL

Appearance:

1. Criminal Misc.Application No. 2377 of 2000

HL PATEL ADVOCATES for Petitioner No. 1

MS NV JOSHI, APP for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 17/03/2003

ORAL JUDGEMENT

This is an application under Subsection 4 of Section 378 of the Code of Criminal Procedure, 1973 (for

short, "the Code"), for Special Leave to Appeal against the judgment and acquittal order dated 15/03/2000, recorded by the learned Metropolitan Magistrate, Court No. 16, Ahmedabad in Criminal Case No. 2324 of 1995, under which the learned Magistrate acquitted the first respondent from an offence punishable under Section 138 of the Negotiable Instruments Act, 1881.

2. The facts of the case of the present petitioner, as complainant, before the trial court may be briefly stated as follows;

> The petitioner and the first respondent were at dealings and out of the said dealings, an amount was due to the petitioner by the first respondent. That in order to pay the said amount, due to the petitioner, the first respondent executed a cheque on 20th March, 1995 in a sum of Rupees One Lakh bearing No. 35783. It was duly signed and handed over to the present petitioner. When the petitioner presented the cheque to the Bank, it was dishonoured and returned by the Bank, with an endorsement of "Insufficient Funds". Therefore, the petitioner issued notice dated 10/07/95 to the first respondent. Since the said notice was not complied with, the petitioner filed the aforesaid complaint before the trial court. Process was issued and evidence was recorded. At the end of trial, the trial court recorded a finding that the case against the first respondent was not proved beyond reasonable doubt. Consequently, the trial court acquitted the contesting respondents from the said offence.

3. Feeling aggrieved by the said judgment and acquittal order of the trial court, the petitioner, original complainant, has preferred this application for Special Leave to Appeal in order to challenge the said acquittal of the first respondent.

4. The learned advocate for the petitioner has taken me through the judgment of the trial court. It is found from the evidence and observation of the trial court that though according to the case of the present petitioner, a cheque dated 20th March, 1995 was issued by the first respondent, the cheque showed that there was overwriting and instead of the year 1994, it was shown as a cheque of 1995, meaning thereby, that instead of 20th March, 1994, it was shown to be a cheque of 20th March, 1995.

5. The trial court has also depended upon an opinion received from the handwriting expert saying that there was overwriting with respect to the said figure '4' in the date 20th March, 1994 and instead of '4', the overwriting showed that it was 20th March, 1995.

6. This shows that as per the evidence on record, the cheque was really issued on 20th March, 1994. But as there was overwriting on the cheque, it was read as a cheque issued on 20th March, 1995. The trial court has also observed during the course of the judgment that the contesting respondent had produced on record, the counterfoil of the cheque, at Ex. 46 bearing the said number which showed that the cheque was really issued on 20th March, 1994. This shows that the fact of overwriting, has been substantiated by the evidence of counterfoil, showing that the said cheque was issued on 20th March, 1994.

7. Now, it is required to be considered here that it is not a mere change of writing or overwriting. If the cheque was really issued in 1994, then the cheque ought to have been presented before the Bank within the limitation, which has not been done in the present case and therefore, the complaint cannot be filed under Section 138 of the said Act. Learned advocate for the applicant has argued that the defence of overwriting was taken at a later stage of the trial and therefore, the applicant had no opportunity to meet with the said defence. As soon as the report of the handwriting expert was called for and as soon as it was produced on record, the applicant was aware about its contents. Moreover, the applicant was also aware as to why the said report was called for. The applicant was also aware about the opinion of the handwriting expert, saying that there was overwriting and instead of the year 1994, it was written as 1995. These things were within the knowledge and notice of the petitioner. If the petitioner wanted to explain the said contradiction, then it was open to the applicant to again stand in the witness box for further examination. He also could have examined other witnesses or he could have produced other materials on record, to show that the cheque was really issued on 20th March, 1995 and not on 20th March, 1994.

8. Therefore, the applicant had enough opportunity to produce appropriate evidence before the trial court to remove the aforesaid doubt which was found to have been created on a bare look at the cheque itself. The trial court has also observed that even on the cheque itself there was an apparent overwriting and therefore, even the

trial court could have acted upon the said overwriting, without the help of the opinion of the handwriting expert.

9. The learned advocate for the applicant has also argued that if the special leave is granted to file appeal, then the applicant can lead further evidence in the appeal. Now, this thing can happen, only if an opportunity was sought by the applicant before the trial court and not given to the applicant before the trial court. It is not the case of the applicant that additional opportunity was sought by the applicant, to lead further evidence and it was not granted to the applicant. On the contrary, it appears from the record that despite the report of the handwriting expert, the applicant did not make any effort to see that the said point is explained by the applicant.

10. Therefore, it is apparently clear that when the cheque was found to have material overwriting, with respect to the date of issue and when the said fact is supported by the handwriting experts' opinion and the counter foil of the cheque, Ex. 46, then it is apparent that the entire proceeding, including the notice by the applicant to the first respondent, are all time barred and therefore, the Court could not have entertained the complaint at all.

11. There is no explanation to the aforesaid lacunae on record and therefore, now there is no need of granting any further opportunity. Even the learned APP appearing on behalf of the State also supports the judgment, stating that there is apparent overwriting on the cheque with respect to the date of issue, which goes to the root of the case. Then, it may not be open to this Court to interfere with the finding of acquittal. After all, this would be a matter of acquittal appeal, to be filed on grant of special leave against an acquittal, recorded by the trial court. When the judgment and reasonings of the trial court are not found to be illegal and perverse and when it is not found that those findings are recorded against the weight of evidence on record, it would not be possible for this Court to reverse the judgment of the trial court. There is no scope for granting leave to appeal and therefore, the application for Special Leave to Appeal under subsection 4 of Section 378 of the Criminal Procedure Code, 1973 is required to be dismissed. For the foregoing reasons, this application is ordered to be dismissed at admission stage.

(D. P. Buch, J.)

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